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in Opinion

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October 29, 1956

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CONCORD, N.H.

Mr. Stanton C. Otis, Right-of-Way Engineer
Department of Public Works and Highways
State House Annex
Concord, New Hampshire

Dear Mr. Otis:

In a letter of September 20, 1956 you pointed out that the Division Engineer had denied an application for a permit for a double drive for a filling station on the northeast quadrant of the Epsom traffic circle. You stated that an oil company has an option to purchase the premises for rather a large sum contingent upon the granting of the permit for the entrances. You note that the present owner also owns contiguous property on Route 25, from which access may readily be had to the area under consideration. You inquire our opinion whether the Department is in any manner liable to the owner for the loss of the sale of the premises by reason of the denial of the application.

In my view neither the State of New Hampshire nor any individual is liable for damages to the owner for the loss of the sale which may result from the denial.

However, I venture the opinion that in a proper action you may be compelled to grant the permit.

The statute (RSA 249:16) confers broad powers upon the Commissioner with respect to regulating entrances from the highway to abutting land. As is the case in all instances of discretionary power, however, such power may not be exercised in an arbitrary, capricious or discriminatory manner. Its exercise to the derogation of the rights of individuals must be based on substantial grounds. You advise that two of the quadrants of the

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traffic circle are already the sites of filling stations, with entrances directly from the circle. It is probable that if access directly upon the circle had never before been permitted its refusal in the present case might logically be supported but the traffic hazard which would arise through the grant of the present application would, it would seem, be no different from that which currently exists.

The matter is a factual one. If through the testimony of expert traffic engineers it appears that a new or different hazard or danger would be created by the existence of the entrances sought, the refusal is supportable. Otherwise, in our belief, it is without foundation in law.

Very truly yours,

Warren E. Waters
Deputy Attorney General

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